In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-646

CHARLES D. BRAND

Petitioner

versus

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Citations

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The petitioner Charles D. Brand respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 5, 1977.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 556 F.2d 1312 (5th Cir. 1977) and it appears in the Appendix hereto. Petitioner Brand was tried by a jury and a judgment was entered in the United States District Court for the Northern District of Florida, Tallahassee Division on July 29, 1976. The District Court Judgment and sentence appears in the Appendix hereto. No written opinion was rendered by the District Court.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 5, 1977. A timely petition for rehearing or for rehearing en banc was denied on October 4, 1977, and the denial appears in the Appendix hereto. This petition for issuance of a writ of certiorari was filed within 30 days of the denial of the petition for rehearing. The jurisdiction of the Supreme Court of the United States is invoked under 38 U.S.C. §1254(1).

JURISDICTION OF THE DISTRICT COURT

Petitioner Brand was charged in a one-count indictment returned by the grand jury on March 11, 1976 as follows:

> That on or about July 23, 1974 in the Northern District Court of Florida Charles Demetrios Brand and Nannie Ruth Brand did knowingly and intentionally possess with intent to distribute and did aid and abet each other in the possession with intent to distribute a Schedule II controlled substance, to wit: cocaine hydrochloride, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

QUESTIONS PRESENTED

I. Were Petitioner's Fifth Amendment due process rights violated by a 20 month pre-indictment delay during which a key defense witness died, where said witness was stipulated by the Government to be an important witness for the defense.

II. Once the exigent circumstances, which justified a police officer's entry into a home without probable cause or search warrant, end may that officer remain in the house and may other officers continue to enter the house without warrant, probable cause, or exigent circumstances.

III. The affidavit in support of the search warrant was insufficient on its face to establish probable cause.

CONSTITUTIONAL PROVISIONS INVOLVED

A. Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

B. Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On July 23, 1974, the Tallahassee Memorial Hospital sent an ambulance to 500 Laura Lee Drive to assist a drug-overdose victim. The Tallahassee Police Department dispatched Officer George Green to help the ambulance attendants. When Green and the attendant entered the house, they found petitioner, Charles Brand, lying unconscious on the floor of the living room. Green testified that he saw marijuana butts, and several pills in the living room. There was confusion in his testimony as to whether he additionally saw hypodermic needles at the same time, although the District Court made no finding concerning this.

Officer Wayne Crawley arrived at the house as Brand was placed in the ambulance. Mrs. Brand and one of the Defendant's brothers went to the hospital. Another brother, David Brand, remained at the house with the policemen. Crawley also reported seeing hypodermic needles and pills in the living room when he first entered. He and Officer Green then apparently walked into one of the bedrooms where they found more hypodermics, pills, powdered substance, and blood stains around the table and on the needle. Crawley said he did not investigate the scene further but instead called in Narcotics Investigator, Walter Beck, to the scene.

Beck testified that numerous pills, pill bottles, injection bottles, and syringes were on the table in the living room of the house when he arrived. It was alleged that David Brand stated to Officer Beck that there was a large amount of cocaine located in the house that had been brought in from South America. Beck then called Sgt. George Brand (no relation to Defendant) of the Tallahassee Vice Squad who directed that the house be secured and that Beck obtain a Search Warrant. Beck submitted the following affidavit to the Magistrate to procure the warrant:

> Your affiant received a call at home from the police dispatcher at 3:18 a.m. in reference to a drug overdose case at 500 Laura Lee Street. When your affiant arrived at the above described location he observed numberous (sic) items of narcotics and dangerous drugs in plain view inside the house. A variety of pills, prescription bottles, syringes, and other narcotic paraphernalia were also observed.
>
> Your affiant talked to David Brand, a guest at the above described house who advised that there was a large amount of cocaine located in the house that had been brought in from South America.

After the Magistrate issued the warrant, the police found a pound to a pound and one-half of cocaine in a thermos bottle in a clothes dryer. The police arrested petitioner, Charles Brand, and his wife on July 23, 1974, for possession of the cocaine in violation of state law. After a State Court Judge suppressed that seized evidence, the prosecutor *nolle prossed* the state charges. A federal investigation began during the Autumn of 1975 and resulted in the return of an indictment on March 11, 1976, more than 20 months after the arrest under the state charges.

During the 20 months between the arrest by Tallahassee police and the Federal indictment, David Brand, brother of

the defendant, died. David Brand was the only person present during the search of the house who was not a law enforcement agent, and some of his alleged statements were used by Officer Beck in his affidavit in support of the search warrant application.

Defendant Charles Brand moved to dismiss the indictment on the ground that the 20 month delay prejudiced his ability to defend himself and that the death of a key defense witness, his brother David, constituted actual prejudice. At the hearing on the motion, the Government stipulated that David Brand would be an important witness for the defense. The District Court denied the motion to dismiss the indictment.

During the trial the District Court refused to suppress the evidence seized under the warrant. At the conclusion of the government's case, the Court granted a motion for judgment of acquittal in favor of Mrs. Brand. Her husband was found guilty by the jury and later sentenced to 10 years in prison.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S DECISIONS CONCERNING ACTUAL PREJUDICE TO A DEFENDANT CAUSED BY AN UNEXPLAINED PREINDICTMENT DELAY.

Twenty months elapsed between the arrest of defendant by Tallahassee police and his indictment. During this time, a key witness, David Brand (brother of Defendant Charles

Brand) died.

The decision of the Fifth Circuit virtually ignores and invalidates the stipulation of the Government that David Brand would be an important witness for the defense.

At the hearing on Defendant's Motion to Dismiss the indictment the United States Attorney, Mr. Davis, stated as follows:

> ....I will stipulate that David Brand would be an important witness for the Defense purposes. I think it is obvious. (Pages 103 and 110-111 of the transcript of hearing are included in the appendix hereto)

In its opinion however, the Fifth Circuit states only that the Government stipulated that David Brand's testimony could be helpful to the defense, and the Court went on to conclude that

> ....the defense is not prejudiced by the unavailability of David and therefore by the preindictment delay. *Brand* at pg 1317

The unreasonable delay of twenty (20) months between the arrest of Petitioner Brand and his federal indictment raises a substantial possibility of prejudice. This possibility ripened into actual prejudice with the death of the key witness for the defense, David Brand, during the twenty-month interval between arrest and indictment. The reasons for the government's stipulation as to the importance of David Brand to the defense is readily apparent from the following

facts:

A. Certain hearsay statements allegedly made by David Brand were recited in the Affidavit submitted in support of the Application for a Search Warrant, and it is clear from the Fifth Circuit opinion that without the alleged statements of David Brand, probable cause for issuance of the warrant would not have existed.

B. David Brand was the *only* person not a law enforcement officer who remained present on the premises after the premises were entered by law enforcement officers.

C. At the hearing on Defendant's Motion to Dismiss the Indictment, Petitioner's wife testified that, prior to his death, David Brand told her that police officers searched the house prior to obtaining a search warrant. (pages 19 and 20 of the hearing transcript are included in the Appendix hereto.)

David Brand's testimony was critically important to the defense in regard to the totality of the circumstances involved in the search of the premises and the subsequent issuance of a search warrant. The Government's stipulation that David Brand would be an important witness for the defense recognized and established the obvious - that the defense was prejudiced by the unavilability, because of death, of David Brand.

The purpose of a stipulation between the parties is to remove the need for proof of the fact stipulated to. The effect of the Government's stipulation in this case was to obviate the need of Defendant Charles Brand's counsel to put on proof of the importance of David Brand's testimony, and hence the prejudice to the Defense resulting from its absence. Defendant Brand reasonably relied upon the Government's stipulation at the hearing on the motion to dismiss the indictment and did not attempt to further establish the importance of the unavailable testimony. The Government's stipulation established that the defense was prejudiced by the unavailability of a witness and therefore by the twenty month preindictment delay during which the witness died.

The Fifth Circuit's decision, by substituting *"could be helpful* to the defense" for the actual Government stipulation that David Brand *"would be an important witness* for the defense," undoes the stipulation upon which Defendant relied and allows the Court to hold that the defense was not prejudiced by the unavailability of David.

The portion of the Fifth Circuit's *Brand* opinion in which *United States v. McGough*, 510 F.2d 298 (5th Cir. 1975) is cited is noteworthy and is quoted below:

> In McGough, which is particularly applicable to the present case, the defendant argued that the death of six witnesses had prejudiced his cause. He contended that several witnesses had firthand knowledge of the transactions involved and that others could impeach Government witnesses. Although the Government vigorously contested the asserted prejudice, the district court found a due process violation. *This Court remanded the case because the district court had not considered*

the factual dispute over whether the testimony of the witnesses was actually important to the defense.

In the instant case, however the actual prejudice to defendant was established by the Government stipulation on the record that David Brand would be an important defense witness.

This Court should consider the Fifth Amendment due process implications of an appellate court circumventing a stipulation by the Government, upon which Defendant relied, to conclude that the defense was not prejudiced by absence of a key witness, and therefore a 20 month preindictment delay also was not prejudicial.

The presence of actual prejudice to Defendant Brand in this case means that the Fifth Circuit's decision is in conflict with this Court's decisions in *United States v. Marion*, 404 U.S. 307, 30 L.Ed. 2d 468 (1971) and *United States v. Lovasco* __U.S. __, 52 L.Ed 2d 752, which establish that where there is actual prejudice to a defendant a preindictment delay can violate the due process clause of the fifth amendment. *Lovasco, Supra* states that the due process inquiry must consider the reasons for delay. In the instant case, however, the record is silent, and the reasons for the government's 20 month delay from the date of the state arrest to the date of the federal indictment is unexplained.

This Court should issue the writ of certiorari to consider the question of whether a government stipulation as to the importance of an unavailable witness is binding in the context of an allegation that fifth amendment due process

rights are violated by an unexplained preindictment delay during which a key witness dies.

II. THE DECISION BELOW RAISES SIGNIFICANT QUESTIONS CONCERNING FOURTH AMENDMENT RIGHTS, DEPARTS FROM THIS COURT'S HOLDINGS AND CONFLICTS WITH OTHER COURTS OF APPEAL.

This question presents a most significant consideration of Fourth Amendment rights. The Fifth Circuit Court of Appeals in ruling that, once there was an initial intrusion without traditional probable cause or warrant requirements upon Fourth Amendment rights, due to exigent circumstances, finds those same rights may continue to be violated without warrant or probable cause even after the exigencies end. The opinion cites no authority from this Court to support its proposition. The reasons for this is clear. The holding is a departure from this Court's teachings in the area of privacy rights related to the Fourth Amendment. *G.M. Leasing Corp. v. U.S.* __U.S.__, 97 S.Ct. 619, 50 L.Ed. 2d 530 at 547 (1977), stands for the proposition that even if there have existed exigent circumstances which would have justified a search or seizure, once those exigencies end, traditional Fourth Amendment standards requiring a search warrant obtain.

The Fifth Circuit's opinion is contrary to the principle in *G.M. Leasing* (supra) and to *Katz v. U. S.*, 389 U. S. 347 (1967). The Fourth Amendment protects, *inter alia*, the right of privacy. There is no precedent in this Court that once that privacy interest is invaded, due to a recognized exception to the Fourth Amendment probable cause and warrant requirement, that it may continue to be violated

after the exigency ends.

The Fifth Circuit's holding in *U.S. v. Green*, 474 F.2d 1385 (5th Cir. 1973) *cert. denied*, 414 U.S. 829 relied upon by the court's ruling below, and the Third Circuit's holding in *Steigler v. Anderson*, 496 F.2d 793 (3rd Cir. 1974), *cert. denied*, 419 U.S. 1002, conflict with the Second Circuit's holding in *U.S. v. Birrell* 470 F.2d 113 (2nd Cir. 1972).

> ....The propriety of the first intrusion into [a person's] privacy does not automatically sanction a second. Even when a "major" intrusion falls within a recognized exception to the Fourth Amendment, the warrant requirement as to a further "minor" intrusion is not abrogated.

Further significance is added to this question by state courts following the rule of *Green*. *Bennett v. Commonwealth*, 188 S.E. 2d 215 (Va. 1972) holds that a warrantless search occurring a day after a fire is one that "the law has traditionally upheld in emergency situations." *People v. Tyler*, 250 N.W. 2d 467 (Mich. 1977) rejects this proposition and *Green*. In *Tyler* the Michigan Supreme Court, follow *G. M. Leasing Corp. supra*, and hold that

> The exigent circumstances exception does not, however, justify a search after the emergency no longer obtains, and the justification for the exception had ceased to exist.

This is the correct interpretation of *G. M. Leasing* and comports with earlier rulings of this Court. The significance of this issue is clear. The Court should review this issue to settle the conflict between its holdings and those of the Courts of Appeal and State Courts departing from them.

III. THE DECISION BELOW CONFLICTS WITH PAST RULINGS OF THIS COURT

The affidavit in support of the search warrant recites basically three facts which could support a finding of probable cause by the Magistrate. Those facts were (1) the hearsay statement that there had been a drug overdose at the residence, (2) that the affiant had seen pills, marijuana butts, and hypodermic needles in the living room at the residence, and (3) that David Brand, a guest in the house, advised that there was a large amount of cocaine located in the house that had been brought in from South America. The holding of the Circuit Court of Appeals in finding that this did establish probable cause is contrary to established Supreme Court law.

Aquilar v. Texas, 1964, 378 U.S. 108 established the two-prong test for determining when a search warrant may issue on information received from a confidential informer. The Court required that:

> The Magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed was credible or his information reliable. 378 U.S. at 114.

Spinelli v. United States, 1969, 393 U.S. 410 further clarified this area. This Court in *Spinelli* held that a tip of an informant, though in itself insufficient under *Aquilar* to constitute probable cause, might be assessed along with other allegations in the affidavit in evaluating the Magistrate's findings. The Court in elaborating on the second-prong of *Aquilar* emphasized the need for the affidavit to provide either "a statement detailing the manner in which the information was gathered," or, failing that, "a description of the accused criminal activity in sufficient detail that the Magistrate may know he is relying upon something more substantial than a casual rumor circulating in the underworld." 393 U.S. at 416.

United States v. Harris, 1971, 403 U.S. 573 further elaborated on *Aquilar* and *Spinelli*. This Court in *Harris* found that the first-prong of *Aquilar*, concerning the requirement of detail supporting the conclusion that the informant was credible could be supported by accumulation of facts recited in the affidavit.

The Court of Appeals found that David Brand's hearsay assertion could not support the search warrant since it failed to meet the standards of *Aquilar*. The Court of Appeals further found that the corroboration gained by the observations of Officer Beck did not confirm the details of the tip. They held, however, that the corroboration "does raise independently an inference that narcotics were on the premises. When combined with the tip, this inference provides the reasonable basis for the Magistrate to conclude that the house probably contained cocaine." 556 F. 2d at 1318.

Can the observation by Officer Beck of pills, marijuana butts, and hypodermic needles corroborate, to the level of probable cause, the statement which David Brand had made concerning cocaine in the house? It appears that the Court of Appeals went beyond the standards required by the *Aquilar, Spinelli, Harris* trilogy and erred in finding probable cause existed. The corroboration required must bear on the statement which is being ocrroborated and here there is no such nexus. The affidavit is insufficient.

The conflict justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

KENT SPRIGGS
324 West College Avenue
Tallahassee, Florida 32301
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November, 1977, three copies of the Petition For Writ of Certiorari were mailed, postage prepared to Nicholas P. Geeker, United States Attorney, Post Office Box 1308, Tallahassee, Florida 32302 and to Wade McCree, Solicitor General of the United States, Room 5143, Department of Justice, Washington, D. C. 20530. I further certify that all parties required to be served have been served.

KENT SPRIGGS
324 West College Avenue
Tallahassee, Florida 32301
Counsel for Petitioner

UNITED STATES of America,
Plaintiff-Appellee,

v.

Charles Demetrios BRAND,
Defendant-Appellant.

No. 76-3202.

United States Court of Appeals,
Fifth Circuit.

Aug. 5, 1977.

Appeal from the United States District Court for the Northern District of Florida.

Before WISDOM, GEE and FAY, Circuit Judges.

WISDOM, Circuit Judge:

Charles Demetrios Brand, the defendant-appellant, challenges his conviction after trial by jury for possession of cocaine hydrochloride with the intent to distribute the controlled substance in violation of 21 U.S.C. § 841. He contends that a 20-month delay between his allegedly criminal act and the indictment violated due process, as well as his statutory and constitutional rights to a speedy trial. He also argues that the district court should have suppressed evidence seized after the issuance of a search warrant. We reject both contentions and affirm the conviction.

I.

On July 23, 1974, the Tallahassee Memorial Hospital sent an ambulance to 500 Laura Lee Drive to assist a drug overdose victim. The Tallahassee Police Department dispatched Officer George Greene to help the ambulance attendants. When Greene and the attendants

entered the house, they found ~~George~~ Charles Demetrios Brand lying unconscious on the floor of the living room. Greene testified that he saw hypodermic needles,[1] marijuana butts, and several pills in the living room. He also heard the ambulance attendant ask Brand's wife whether her husband was on drugs. She reportedly responded that he had taken hard drugs.

Officer Wayne Crawley arrived at the house as Brand was placed in the ambulance. Mrs. Brand and one of the defendant's brothers went to the hospital. Another brother, David Brand, remained at the house with the policemen. Crawley also reported seeing hypodermic needles and pills in the living room when he first entered. He and Officer Greene then apparently walked into one of the bedrooms where they found more hypodermics, pills, powdered substances, and blood stains around a table and on a needle. Crawley said he did not investigate the scene further but instead called a narcotics investigator, Walter Beck to the scene.

Beck testified that numerous pills, pill bottles, injection bottles, and syringes were on the table in the living room of the house when he arrived. He spoke with David Brand, who said that his

1. When Greene restated on cross examination what he saw when he entered the house, he omitted the needles. Given the flow of cross examination and the testimony of Officer Crawley who also saw hypodermic needles in the living room, the omission by Officer Greene is not significant.

brother had probably reacted to the cocaine that they had been shooting. David also reportedly said that the cocaine was part of a shipment his brother had just received and stored in the attic of the house. Beck then called Sergeant George Brand, who directed that the house be secured and that Beck obtain a search warrant. Beck submitted the following affidavit to the magistrate to procure the warrant:

> [Y]our Affiant received a call at home from the police dispatcher at 3:48 a. m. in reference to a drug overdose case at 500 Laura Lee Street. When your Affiant arrived at the above described location, he observed numberous [sic] items of narcotics and dangerous drugs in plain view inside the house. A variety of pills, prescription bottles, syringes, and other narcotic paraphernalia were also observed.
>
> Your Affiant talked to David Brand, a guest at the above described house, who advised that there was a large amount of cocaine located in the house that had been brought in from South America.

Beck explained on cross examination that all of the items listed as in plain view were in the living room of the house, not in the bedroom. He asserted, however, that the bedroom could be seen from the living room.[2]

2. Beck acknowledged that Officer Greene had gone into the bedroom before Beck arrived. According to Beck, David had taken Greene to show him currency that was later seized pursuant to the search warrant.

After the magistrate issued the warrant, the police found a pound to a pound and a half of cocaine in a thermos bottle in a clothes dryer. They also seized syringes, foreign currency, $10,670 in cash, and small quantities of cocaine.

The police arrested ~~George~~ Charles Brand and his wife on July 23, 1974, for possession of the cocaine in violation of state law. After a state court judge suppressed the seized evidence, the prosecutor nolle prossed the state charges. A federal investigation began during the autumn of 1975 and resulted in the return of an indictment on March 11, 1976, more than 20 months after the arrest under the state charges but within the period of the applicable federal statute of limitations.[3]

During the trial the district court refused to suppress the evidence seized under the warrant. ~~The court did not state its reasons for the refusal~~. At the conclusion of the Government's case, the court granted a motion for judgment of acquittal in favor of Mrs. Brand. Her husband was found guilty by the jury and later sentenced to 10 years in prison.

3. 18 U.S.C. § 3282 (1970), which states:

> Except as otherwise provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

II.

Brand argues first that the 20-month preindictment delay requires reversal of his conviction and dismissal of the charges against him under either Rule 48(b) of the Federal Rules of Criminal Procedure[4] or the speedy trial provision of the sixth amendment[5] or the due process clause of the fifth amendment.[6]

[1] Rule 48(b) applies only to a preindictment delay that occurs after the defendant "has been held to answer to the district court". In this case, however, the defendant was not held to answer on the charges for which he was convicted in the district court until after the in-

4. Rule 48(b) states in part:

> If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

5. The sixth amendment to the Constitution states in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .

6. The fifth amendment to the Constitution states in part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

dictment. The defendant did not face arrest by federal authorities before the indictment; the state arrest alone did not trigger the Rule because it did not require Brand to answer to the federal district court. Thus, dismissal is not required by Rule 48(b) when a federal arrest has not occurred and the grand jury has returned the indictment within the period of the applicable statute of limitations. *United States v. Giacalone*, 6 Cir. 1973, 477 F.2d 1273; *United States v. Grayson*, 5 Cir. 1969, 416 F.2d 1073, *cert. denied*, 1970, 396 U.S. 1059, 90 S.Ct. 754, 24 L.Ed.2d 753, *rehearing denied*, 397 U.S. 1003, 90 S.Ct. 1114, 25 L.Ed.2d 415, and 399 U.S. 917, 90 S.Ct. 2191, 26 L.Ed.2d 576.

[2] The defendant's sixth amendment claim also lacks merit because he was not subjected to a federal arrest until after the federal indictment. *United States v. Marion*, 1971, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468, held that the speedy trial provision of the sixth amendment provides a person no protection until he becomes an accused by arrest or indictment. *Accord, United States v. Lovasco*, — U.S. —, 97 S.Ct. 2044, 52 L.Ed.2d —, 1977. The Court recognized that any delay from the date of the criminal act might impair defense preparation. It might also prejudice the Government's case. Yet the Court concluded that the amendment was directed toward other interests:

> [T]he major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy and create anxiety in him, his family and his friends.

404 U.S. at 320, 92 S.Ct. at 463.

Here the United States did not visit the evils identified in *Marion* upon the defendant until the return of the bill of indictment. Consequently, the Government did not infringe the defendant's sixth amendment rights by waiting 20 months to charge him. *See United States v. Grayson*, 5 Cir. 1969, 416 F.2d 1073, 1076–77.

[3] A preindictment delay can violate the due process clause of the fifth amendment even where the defendant has not been arrested or otherwise accused before the indictment. In *Marion* the Court recognized this possibility when it noted the Government's concession that due process would require dismissal when an intentional tactical delay by a prosecutor substantially prejudiced a defendant. *United States v. Lovasco*, — U.S. —, 97 S.Ct. 2044, 52 L.Ed.2d —, 1977, recently reaffirmed the *Marion* holding. In each case, however, the

Court noted that the due process determination would vary from case to case. *Id.* at ——, 97 S.Ct. 2044; *United States v. Marion*, 404 U.S. at 324, 92 S.Ct. 455. Brand argues in this case that the 20-month delay substantially prejudiced his ability to prepare his defense. In particular, he submits that the death of his brother David, the only family member who remained at the house during the search, prevented an effective challenge by the defense to the admission into evidence of the seized cocaine.

The Supreme Court has held that *Marion* requires a showing of actual prejudice. *United States v. Lovasco*, — U.S. at ——, 97 S.Ct. 2044; *see United States v. McGough*, 5 Cir. 1975, 510 F.2d 598; *United States v. Beckham*, 5 Cir. 1975, 505 F.2d 1316, cert. denied, 421 U.S. 950, 95 S.Ct. 1683, 44 L.Ed.2d 104; *United States v. Zane*, 5 Cir. 1973, 489 F.2d 269, *cert. denied*, 1974, 416 U.S. 959, 94 S.Ct. 1975, 40 L.Ed.2d 310. In *McGough*, which is particularly applicable to the present case, the defendant argued that the death of six witnesses had prejudiced his cause. He contended that several witnesses had firsthand knowledge of the transactions involved and that others could impeach Government witnesses. Although the Government vigorously contested the asserted prejudice, the district court found a due process violation. This Court remanded the case because the district court had not considered the factual dispute over whether the testimony of the witnesses was actually important to the defense.

[4, 5] In this case the Government stipulated before the district court that David Brand's testimony could be helpful to the defense. On reviewing the record, however, David's presence would not seem to add significantly to the defendant's arguments. The conviction was based primarily on the cocaine that the police seized in Brand's residence. Because David remained at the house during the search, he could testify as to the circumstances relating to the discovery of the cocaine. His testimony could defeat the validity of the warrant only if he could convince the district court that he had not told Officer Beck about the cocaine or that the marijuana butts, hypodermic needles, and pills were not in plain view in the living room when Officers Greene and Crawley arrived. See Section III of this opinion. But neither factual proposition is disputed; there is only uncertainty about whether David consented to a search of the bedroom and whether additional material from the bedroom was taken to the living room by the police before they procured the warrant. Because the validity of the warrant does not depend on material that might have been found in the bedroom, the defense is not prejudiced by the unavailability of David and therefore by the preindictment delay.[7]

7. The parties argue in their briefs about whether *Marion*, as interpreted by this Court, requires the defense to show both actual prejudice and intentional tactical delay by the prosecutor before a due process violation may

III.

The Tallahassee police seized the cocaine and narcotics paraphernalia pursuant to a search warrant. The validity of the warrant, and therefore of the seizure, depends on whether the police legally entered the house before the warrant was issued and on whether the affidavit contains sufficient information to support the finding of probable cause.

be found. The dispute is settled by *United States v. Lovasco*, — U.S. ——, 97 S.Ct. 2044, 52 L.Ed.2d ——, 1977, which holds that prejudice alone "makes a due process claim concrete and ripe for adjudication". *Id.* at ——, 97 S.Ct. at 2048. Whether the claim is valid depends on the due process balancing between the extent of the actual prejudice and the governmental interests at stake. The opinion does not indicate that governmental interests not amounting to an intentional tactical delay will automatically justify prejudice to a defendant. On the contrary, the Court engages in a sensitive balancing of the government's need for an investigative delay in *Lovasco* against the prejudice asserted by the defendant.

The analysis in *Lovasco* is consistent with most Fifth Circuit cases. *See United States v. McGough*, 5 Cir. 1975, 510 F.2d 598; *United States v. Beckham*, 5 Cir. 1975, 505 F.2d 1316; *United States v. Zane*, 5 Cir. 1973, 489 F.2d 269. Only *United States v. Butts*, 5 Cir. 1975, 524 F.2d 975, seemed to require a showing of both actual prejudice and intentional delay. *Lovasco* indicates that such a requirement misreads *Marion*, which stated:

> We need not, and could not now, determine when and in what circumstances actual prejudice resulting from preaccusation delay requires the dismissal of the prosecution.

United States v. Marion, 1971, 404 U.S. 307, 324, 92 S.Ct. 455, 465, 30 L.Ed.2d 468, 481. According to the Supreme Court, that statement remains true today. *Lovasco*, — U.S. at ——, 97 S.Ct. 2044. Clarity will come only on a case-by-case basis.

The defendant argues first that only Officer Greene entered the house legally. When he assisted the ambulance attendants, Greene's presence in the house was permitted by the exigent circumstance of the medical emergency. According to Brand, however, officers who entered subsequently cannot justify their presences with the same exigent circumstance because the medical emergency ended prior to their arrivals.[8] Consequently, he suggests that Sergeant Brand and Officers Beck and Crawley illegally entered the house, thereby tainting the information they gathered for the probable cause affidavit.

[6, 7] We reject the defendant's contention because it misconceives the nature of the fourth amendment interest at stake. The amendment protects the citizen against invasion of privacy. Once that interest is invaded legally by an official of the State, the citizen has lost his reasonable expectation of privacy to the extent of the invasion. As this Court has held repeatedly, additional investigators or officials may therefore enter a citizen's property after one official

8. Officer Crawley, the second policeman on the scene, arrived as Brand was being placed in the ambulance. At that point a medical emergency no longer existed in the house.

has already intruded legally.[9] *E. g. United States v. Green*, 5 Cir. 1973, 474 F.2d 1385, 1390, *cert. denied*, 414 U.S. 829, 94 S.Ct. 55, 38 L.Ed.2d 63; *United States v. Herndon*, S.D.Fla.1975, 390 F.Supp. 1017, *aff'd*, 5 Cir. 1976, 536 F.2d 1027; *see Steigler v. Anderson*, 3 Cir. 1974, 496 F.2d 793, 797–98, *cert. denied*, 419 U.S. 1002, 95 S.Ct. 320, 42 L.Ed.2d 277. Later arrivals may join their colleagues even though the exigent circumstances justifying the initial entry no longer exist. *Id.* Thus, the validity of the affidavit is not vitiated by the late entry of the affiant and the other policemen.

[8] The defendant next argues that the affidavit did not contain sufficient information to justify a finding of probable cause for the search. He pointed out that the information as to the cocaine in the house depends on the hearsay assertion by David Brand that the shipment from South America was located there. The defendant submits that the district court should not have relied on this tip alone, because of its being hearsay. *Aguilar v. Texas*, 1964, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723. This point is well taken. The affidavit contains no information with which the magistrate could independently evaluate the reliability of David, the informant.

9. Of course, the later officials must confine their intrusion to the scope of the original invasion unless a warrant or one of the exceptions to the warrant requirement justifies a more thorough or wide ranging search.

See id. at 114, 84 S.Ct. 1509. The document does not, for example, identify David as the defendant's brother. The magistrate could not then presume that David would not falsely implicate a family member in a crime. The affidavit also does not permit a finding that David provided the tip against his own penal interest. There is no indication that David participated in any criminal activity or illegally possessed the cocaine; the document states only that he was a guest in the house. *Compare United States v. Barfield*, 5 Cir. 1975, 507 F.2d 53, *cert. denied*, 421 U.S. 950, 95 S.Ct. 1684, 44 L.Ed.2d 105; *Ludwig v. Wainwright*, 5 Cir. 1970, 434 F.2d 1104. Consequently, David's hearsay assertion cannot support the search warrant by itself.

[9] Despite the inadequacy of the affidavit, the district court properly issued the warrant in this case because the hearsay was corroborated by independent police investigation. *Spinelli v. United States*, 1969, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637; *Polanco v. Estelle*, 5 Cir. 1975, 507 F.2d 81, *cert. denied*, 423 U.S. 854, 96 S.Ct. 101, 46 L.Ed.2d 78; *Lopez v. United States*, 5 Cir. 1966, 370 F.2d 8. As the Court explained in *Gonzales v. Beto*, 5 Cir. 1970, 425 F.2d 963, *cert. denied*, 400 U.S. 928, 91 S.Ct. 194, 27 L.Ed.2d 189, an informer's tip may be buttressed either by independent observations substantiating the

details of the tip or by independent observations of activity reasonably arousing suspicion itself. *Id.* at 969. Regardless of the approach, the tip and the corroboration must constitute probable cause to believe that the object of the search was on the premises to be examined. The information must raise more than a "reasonable suspicion" in the magistrate's mind to ensure an effective check on the competitive zeal of law enforcement officials. *Id.* at 968, *quoting Johnson v. United States*, 1948, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436, 440. Here, although the corroboration does not confirm the details of the tip, it does raise independently an inference that narcotics were on the premises. When combined with the tip, this inference provides a reasonable basis for the magistrate to conclude that the house probably contained cocaine.

[10] We have reached this conclusion even though we omitted consideration of several items of contraband listed in the affidavit. By comparing the testimony of Greene and Crawley with that of Beck, the inference arises that the first two officers brought several items into the living room from the bedroom before Beck arrived. Unless the materials in

the bedroom were in plain view from the living room, however, their seizure was illegal.[10] The medical emergency justified the officers' presence only in the living room. Brand retained a reasonable expectation of privacy in other areas of the house. Infringement of that expectation requires the suppression of any evidence acquired thereby, including its use to secure a search warrant.[11] *Alderman v. United States*, 1969, 394 U.S. 165, 178–79, 89 S.Ct. 961, 969, 22 L.Ed.2d 176, 190, *rehearing denied, Ivanov v. U. S.*, 394 U.S. 939, 89 S.Ct. 1177, 22 L.Ed.2d 475. Consequently, we have considered only the items that Greene and Crawley said were in plain view when they entered the living room: hypodermic needles, marijuana butts, and pills. These items, when considered with the tip and the occurrence of a drug overdose emergency on the premises, support the magistrate's probable cause finding.

The judgment of the district court is AFFIRMED.

10. The record does not clearly indicate whether the materials that probably came from the bedroom were in plain view from the living room. If the validity of the warrant depended on the inclusion of these articles in the affidavits, we would remand the case to the district court for further factual findings on the plain view issue. The remand is not required, however, because the affidavit includes sufficient corroboration without the items.

11. We have excluded from the consideration the listing in the affidavit of narcotics, dangerous drugs, prescription bottles, and narcotic paraphernalia.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By Susan M. Steward
Deputy
OCT 12 1977
New Orleans, Louisiana

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-3202

D. C. Docket No. CR-76-4

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

CHARLES DEMETRIOS BRAND,
Defendant-Appellant

FILED: Oct. 17, 1977

Appeal from the United States District Court for the
Northern District of Florida

Before WISDOM, GEE and FAY, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby,

affirmed.

August 5, 1977

Issued as Mandate: Oct 12 1977

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U.S. Court of Appeals, Fifth Circuit
By: s/ Susan N. Gravois
Deputy

Oct 12, 1977
New Orleans, Louisiana

APENDIX C
Letter notifying the Denial of Petition for Rehearing

United States Court of Appeals
Fifth Circuit

Edward W. Wadsworth
Clerk

Office of the Clerk
October 4, 1977

504-589-6514
600 Camp St.
New Orleans, La. 70130

TO ALL PARTIES LISTED BELOW:

NO. 76-3202 - U.S.A. v. CHARLES DEMETRIOS BRAND

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk
By: s/ Brenda M. Hauck
Deputy Clerk

** on behalf of appellant, Brand,

cc: Mr. Stewart E. Parsons
Mr. Nickolas P. Geeker
Mr. Clifford L. Davis

APPENDIX D

JUDGMENT AND PROBATION/COMMITMENT ORDER

United States of America vs.
Charles Demetrios Brand UNITED STATES DISTRICT COURT for the NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION
Docket No. TCR 76-4

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date JULY 29, 1976

WITH COUNSEL Stewart Parsons.

PLEA

NOT GUILTY.

FINDING & JUDGMENT

There being a verdict of GUILTY.

Defendant has been convicted as charged of the offense(s) of on or about July 23, 1974, knowingly and intentionally possessing with intent to distribute a Schedule II controlled substance, to-wit: cocaine hydrocholoride, in violation of Title 21 USC 841(a)(1) as charged in the one count indictment.

SENTENCE OR PROBATION ORDER
SPECIAL CONDITIONS OF PROBATION

The court asked whether defendant had anything to say

why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Ten (10) years with a special parole term of three(3) years.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
U.S. District Judge
s/ William Stafford
WILLIAM STAFFORD
Date July 29, 1976

APPENDIX E

EXCERPTS FROM TRANSCRIPT

came back he was lying on the bed and I didn't know what was wrong with him. I called an ambulance to come and get him to take him to the hospital.

Q Did you accompany the ambulance to the hospital?

A Yes, sir, I did.

Q Did anyone else come with the ambulance to the hospital?

A His brother, Jimmy, followed us to the hospital in his car.

Q How many children did you have at that point in time?

A Two.

Q What were their ages at this point in time?

A The oldest was 7 and Michael wasn't quite one.

Q Did anyone remain at the house to look after the children in your absence?

A My husband's brother David.

Q Now, is David the brother that is now deceased?

A Yes, sir.

Q Have you talked with David subsequent to that evening about what happened while he was in the house after you had gone to the hospital and your husband and Jimmy Brand had gone to the hospital?

A Just a little bit.

Q What did he tell you?

A He told me that -- well, a policeman accompanied the ambulance to the hospital, I mean to the house, and he said the police searched the house and then they called George Brand and George Brand came in and said that it looks like we need to get a warrant.

Q So that is the essence of the conversation you had with David Brand about the evening?

A Yes, sir.

Q Now, when did you become pregnant with the twins?

A About the middle of February, 1975.

Q At that point in time what was your impression as to the status of the criminal proceedings in Tallahassee against you and your husband?

A We had been informed the case had been dropped.

Q How did you feel about that and what was your attitude towards that?

A I was happy.

Q Since that time would you just describe to the Court what you and your husband have done in Maysville and how you have approached your life since February of 1975?

A Well, we had the twin boys and we worked, my husband has been planting a garden and working as a plumber's helper, and just been trying to raise our kids and --

Q Has life gone pretty well during that time period?

A Well, we have had some unfortunate accidents, but --

* * *

would be a helpful witness for the Government, yes, sir.

Q Is it not true that the officers got into the house to start with because of David Brand's consent and particularly the areas where they found things in plain view?

A I think the officers got into the house when they went in with the ambulance attendants to remove those persons o.d.'d in the house.

Q But he didn't see anything on that trip?

A Apparently they saw drugs on plain view on the table.

Q In making that statement did you review the police reports in the file?

MR. DAVIS:

Your Honor, I would like to interpose an objection at this time that we are actually getting beyond what is contained in the file, but other than that I will stipulate that David Brand would be an important witness for the Defense purposes. I think it is obvious.

MR. PARSONS:

That is the only reason I was getting into that area, your Honor. That is one of the important criterias you have to show in these kinds of situations.

THE COURT:

All right, gentlemen, can we speed this thing

* * *

THE COURT:

Mr. Davis?

MR. DAVIS:

No questions.

THE COURT:

All right, Mr. Warren, you may be excused.

(Whereupon, the witness was excused.)

MR. PARSONS:

I have nothing further, your Honor.

THE COURT:

All right, is that it?

MR. PARSONS:

Your Honor, could we submit argument in writing. We would like to save the Court time and I think the Court is going to need to take this matter under advisement to read through the transcripts and to avoid taking up the Court's time we chose to do that by that manner rather than the actual live tapes.

THE COURT:

All right, well, what more do you have to say that is not in your -- that is not on file. I will give you 5 days, each side to submit, if you wish, and then I plan to rule on it just as promptly as I can.

MR. PARSONS:

I want to be sure that the record establishes that the Government has stipulated that Mr. David Brand would be an important witness.

THE COURT:

I recall that, Mr. Parsons.

You got that stipulation from him.

Will 5 days, until next Monday give you enough time?

MR. PARSONS:

Yes, sir, your Honor.

MR. DAVIS:

We are ready to argue now but that would be fine to handle it that way.

THE COURT:

Do you want to argue now or put it in writing?

MR. PARSONS:

It doesn't matter, I am trying to save time for the Court.

THE COURT:

You have the Court Reporter here. It will save a lot of paper. Go ahead and argue your case now if you want to.

MR. PARSONS:

Your Honor, just to generally summarize, I think that the Defendant has carried the burden, particularly on the grounds for the motion that relate to the due processes

* * * *

No. 77-646

In the Supreme Court of the United States

OCTOBER TERM, 1977

CHARLES D. BRAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

KATHERINE WINFREE,
Attorney,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-646

CHARLES D. BRAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 556 F. 2d 1312.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on August 5, 1977. A petition for rehearing was denied on October 4, 1977 (Pet. App. C). The petition for a writ of certiorari was filed on November 3, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the warrant issued to search petitioner's residence was supported by probable cause.

2. Whether petitioner was deprived of due process by the death of a witness during the 20-month period between the offense and the indictment.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted of possession of cocaine hydrochloride with intent to distribute it, in violation of 21 U.S.C. 841(a)(1).[1] He was sentenced to 10 years' imprisonment and three years' special parole. The court of appeals affirmed (Pet. App. A).

1. The evidence showed that on July 23, 1974, an ambulance and police officers were dispatched to 500 Laura Lee Drive, Tallahassee, Florida, to assist a drug overdose victim (Tr. 19-20, 32-33).[2] When Officer George Greene and the ambulance attendants arrived, they observed petitioner lying unconscious on the floor of the living room, surrounded by his wife and brothers, James and David Brand (Tr. 33). Officer Greene also noticed hypodermic needles, marijuana butts, and several pills in the living room (Tr. 34, 63-65). As petitioner was being placed in the ambulance, Officer Wayne Crawley arrived at the residence (Tr. 27). Petitioner's wife and James Brand went to the hospital with petitioner, while David Brand remained at the house with the officers (Tr. 34). Officers Crawley and Greene then entered one of the bedrooms and found more hypodermic needles, pills,

[1]Co-defendant Nannie Ruth Brand, petitioner's wife, was acquitted (Tr. 177).

[2]"Tr." and "H. Tr." refer, respectively, to the trial transcript and the transcript of the June 1, 1976, hearing on petitioner's motion to dismiss the indictment. "R." refers to the record in the court of appeals.

powdered substances and blood stains around a table and on a needle (Tr. 28-29). Officer Crawley immediately summoned Walter Beck, a narcotics investigator (Tr. 29, 37).

When Officer Beck arrived, numerous pills, pill bottles, injection bottles, and syringes were in plain view on a table in the living room (Tr. 38, 53-55). Officer Beck spoke with David Brand, who stated that petitioner had probably reacted to the cocaine that they had been using. David Brand also told the officer that the cocaine was part of a shipment petitioner had just received and stored in the attic of the house (Tr. 60). Based on this information and his personal observations, Officer Beck procured a warrant to search the house (Tr. 38). The search executed pursuant to the warrant disclosed a pound to a pound and a half of cocaine concealed in a thermos bottle, syringes, foreign currency, and $10,670 in cash (Tr. 40, 42-43, 45-46, 89-95, 100).

2. Petitioner and his wife were arrested on July 23, 1974, for possession of cocaine, in violation of Florida law (H. Tr. 9-10). In February 1975, however, after the evidence seized from petitioner's residence had been suppressed by the state court on the basis of a facial defect in the search warrant affidavit, the state prosecutor dismissed the charges (H. Tr. 69).[3] Petitioner and Mrs.

[3]The state court apparently suppressed the evidence on the basis of an earlier decision that was subsequently overturned on appeal. See H. Tr. 70-73. According to the state prosecutor, the case was dismissed because he believed appeal of the suppression ruling would be unsuccessful. The case was thereafter referred to the United States Attorney in October or November 1975 (H. Tr. 69, 74-75; 1 R. 30-31). There had been no federal involvement during the pendency of the state prosecution because of the federal government's policy against dual prosecution absent extraordinary circumstances (1 R. 23).

Brand were subsequently indicted by a federal grand jury on the instant charges on March 11, 1976. On April 30, 1976, they filed a motion to dismiss, alleging, *inter alia*, that they had suffered actual prejudice due to the death of petitioner's brother, David Brand, during the 20-month period between discovery of the offense and the federal indictment (1 R. 12-14).

At the evidentiary hearing on the motion, petitioner's wife attempted to establish the materiality of David Brand's testimony to an effective challenge to the admission of the cocaine by testifying that, prior to his death, David had told her that the police officers had searched the house before obtaining a warrant (H. Tr. 19-20). In addition, the state prosecutor was cross-examined on this point (H. Tr. 100-103):

> Q. Would you not consider David Brand an important witness in this case?
>
> A. It depends upon the—whether or not you're interested in the search warrant. Probably what the law enforcement officers saw on the scene would have been sufficient to issue a warrant.
>
> I think the information by David Brand would have been certainly helpful, and would have bolstered and may be extremely important.
>
> * * * * *
>
> Q. And David Brand is a material witness both as to the search warrant and as to probable cause for the search warrant, is he not?
>
> A. He is supplemental in the search warrant and based upon what he is recorded as saying in the search warrant he would be a helpful witness for the government, yes sir.

> Q. Is it not true that the officers got into the house to start with because of David Brand's consent and particularly the areas where they found things in plain view?
>
> A. I think the officers got into the house when they went in with the ambulance attendants to remove those persons [sic] o.d.'d in the house.
>
> Q. But he didn't see anything on that trip?
>
> A. Apparently they saw drugs on plain view on the table.

In that context, the federal prosecutor acknowledged (H. Tr. 103) that David Brand "would be an important witness for the Defense purposes." However, he further stated (H. Tr. 127-128):

> We don't feel that he would be as important perhaps as [defense counsel] has alleged in that at the time that the officers and the ambulance attendants gained entry into the house, both James Brand and Mrs. Brand were also present.

Following the hearing, on June 3, 1976, the district court denied the motion to dismiss (1 R. 30-34), observing that although the government attorney had conceded the potential importance of David Brand's testimony, he had "also pointed out that David Brand's testimony would not be as crucial as [alleged], since both [petitioner's wife] and James Brand (another brother of [petitioner]) were also present in the home when entry was made" (1 R. 33).

ARGUMENT

1. Petitioner challenges the validity of the warrant authorizing the search of his house.

a. Petitioner first contends (Pet. 13-15) that the affidavit submitted in support of the search warrant did not establish probable cause. The affidavit (see Pet. App. A-3) was based upon the personal knowledge of Officer Beck, who stated that at 3:48 a.m. on July 23, 1974, he had been dispatched to petitioner's residence to respond to a drug overdose case, that he had observed pills and syringes at the residence, and that David Brand, a guest at the residence, had informed him that there was a large quantity of cocaine in the house.[4]

Although the court of appeals found that Officer Beck's "affidavit contain[ed] no information with which the magistrate could independently evaluate the reliability of David, the informant" and therefore that "David's hearsay assertion [could not] support the search warrant by itself" (Pet. App. A-12, A-13), the court nonetheless concluded that the warrant was issued upon probable cause since "the hearsay was corroborated by an independent police investigation" (*id.* at A-13). We question whether David Brand's statement to Officer Beck should be tested by the standards of *Aguilar* v. *Texas*, 378 U.S. 108, and *Spinelli* v. *United States*, 393 U.S. 410. Those cases were concerned with information provided to

[4]The affidavit also related Officer Beck's observation of "narcotics and dangerous drugs[,] * * * prescription bottles * * * and other narcotic paraphernalia" in the house (Pet. App. A-3). Although the court of appeals found that Officers Greene and Crawley had lawfully entered the living room in response to the emergency call and had therefore properly observed the marijuana butts, pills and hypodermic needles in plain view, the court also concluded that the medical emergency did not justify their entry into petitioner's bedroom. Because the officers apparently moved to the living room a number of items they saw in the bedroom prior to Officer Beck's arrival (Pet. App. A-14), the court excluded consideration of those items for purposes of determining probable cause (*id.* at A-15 and n. 11).

police by confidential, paid informants, and several courts have suggested that their holdings should not be extended to other contexts. See, *e.g.*, *United States* v. *Swihart*, 554 F. 2d 264, 268-269 (C.A. 6); *United States* v. *Rueda*, 549 F. 2d 865, 869 (C.A. 2); *United States* v. *Rollins*, 522 F. 2d 160, 164 (C.A. 2), certiorari denied, 424 U.S. 918; *United States* v. *Darensbourg*, 520 F. 2d 985, 988-989 (C.A. 5); *United States* v. *McCoy*, 478 F. 2d 176, 179 (C.A. 10), certiorari denied, 414 U.S. 828. Moreover, the statement was reliable because it was against David's penal interest. See *United States* v. *Harris*, 403 U.S. 573, 583.

In any event, as the court below held, even if the affidavit is appraised without reliance upon David's information, it sets forth facts supporting the issuance of the warrant. Officer Beck, in responding to a drug overdose emergency, personally observed hypodermic needles and other evidence of drug activity in plain view in the living room of the residence. This justified a reasonable belief that narcotics were probably on the premises, and the warrant was properly issued to search for "narcotics and dangerous drugs" (1 R. 38).

b. Petitioner also suggests (Pet. 11-13) that the affidavit was tainted by Officer Beck's observations because they were the product of an illegal search. Petitioner does not contest that Officer Greene entered his residence lawfully in response to the medical emergency, but he argues that once that emergency had terminated, Officer Beck had no right subsequently to enter the house absent a warrant. The court of appeals correctly answered this claim (Pet. App. A-11 to A-12; citations and footnote omitted):

> The [Fourth] amendment protects the citizen against invasion of privacy. Once that interest is invaded legally by an official of the State, the citizen has lost

> his reasonable expectation of privacy to the extent of the invasion. * * * [A]dditional investigators or officials may therefore enter a citizen's property after one official has already intruded legally. * * * Later arrivals may join their colleagues even though the exigent circumstances justifying the initial entry no longer exist. * * * Thus, the validity of the affidavit is not vitiated by the late entry of the affiant * * *.

See *Steigler* v. *Anderson*, 496 F. 2d 793, 797-798 (C.A. 3), certiorari denied, 419 U.S. 1002; *United States* v. *Green*, 474 F. 2d 1385, 1390 (C.A. 5), certiorari denied, 414 U.S. 829.

Contrary to petitioner's contention (Pet. 12), the decision below does not conflict with *United States* v. *Birrell*, 470 F. 2d 113 (C.A. 2). In *Birrell*, evidence legally seized in a state murder investigation subsequently came to the attention of federal authorities through a news story. A federal prosecutor obtained permission to examine the evidence from state officials, who advised that the owner had demanded return of the property. Under those facts, the court held that the owner "had sufficiently manifested his claim that a search by law enforcement officers of another sovereign for a different purpose could not be made without a warrant" (470 F. 2d at 117). Here, by contrast, both the initial and subsequent intrusions were made by agents of the same sovereign involved in the identical investigation, law enforcement agents were continuously present in the residence during the period of the searches, and the evidence had not been removed from petitioner's house, nor had a demand been made for its return. See *United States* v. *DeBerry*, 487 F. 2d 448, 451 and n. 4 (C.A. 2).[5]

---

[5]For the same reasons, this case is distinguishable from *Michigan* v. *Tyler*, No. 76-1608, argued January 10, 1978.

2. Petitioner contends (Pet. 6-11) that the government's concession at oral argument on his motion to dismiss that David Brand "would be an important [defense] witness" established actual prejudice to his defense occasioned by the pre-indictment delay. As noted above, however, petitioner has misconstrued the extent of the government's concession. The statement was made during the course of petitioner's attempt to elicit the state prosecutor's opinion whether David Brand's testimony would have borne significantly on the lawfulness of the initial entry and subsequent search of the bedroom (see H. Tr. 100-103). In that context, the Assistant United States Attorney conceded that David's testimony would have been important, but he quickly emphasized that its importance was decreased substantially by the fact that both Mrs. Brand and James Brand had also been present when the officers first entered the residence (H. Tr. 127-128).[6] Moreover, the subsequent search of the bedroom was irrelevant, because items observed there by Officers Green and Crawley were not essential to support the magistrate's finding of probable cause.[7] As the court of appeals noted (Pet. App. A-9; footnote omitted):

---

[6]Defense counsel conceded at the hearing that James Brand would be available as a trial witness (H. Tr. 17). The fact that David Brand was alive at the time of the state suppression hearing (his death was contemporaneous with the return of the federal indictment) but apparently was not called to testify in that proceeding undermines the suggestion that his testimony was in fact vital to litigation of the lawfulness of the same search in the federal case.

[7]See note 4, *supra*. Even if petitioner could have established that he suffered actual prejudice as a result of the pre-indictment delay, his Fifth Amendment claim still could not have succeeded because there was no suggestion, much less a finding, that the delay was undertaken in bad faith or for any improper motivation. See note 3, *supra*: *United States* v. *Lovasco*, 431 U.S. 783. Indeed, in the court of appeals petitioner specifically disclaimed any allegation of bad faith on the part of the federal government (see Ct. App. Br. 17).

David's presence would not seem to add significantly to [petitioner's] arguments. The conviction was based primarily on the cocaine that the police seized in [petitioner's] residence. Because David remained at the house during the search, he could testify as to the circumstances relating to the discovery of the cocaine. His testimony could defeat the validity of the warrant only if he could convince the district court that he had not told Officer Beck about the cocaine or that the marijuana butts, hypodermic needles, and pills were not in plain view in the living room when Officers Greene and Crawley arrived. * * * But neither factual proposition is disputed; there is only uncertainty about whether David consented to a search of the bedroom and whether additional material from the bedroom was taken to the living room by the police before they procured the warrant. Because the validity of the warrant does not depend on material that might have been found in the bedroom, the defense is not prejudiced by the unavailability of David and therefore by the preindictment delay.

Finally, we note that the claim of prejudice in this case does not relate to the loss of evidence that might have tended to establish petitioner's innocence of the offense with which he was charged, but rather to an alleged impairment of the ability to block the introduction of evidence demonstrating petitioner's guilt. We question whether a due process claim of prejudicial pre-indictment delay is available at all where the prejudice related only to the litigation of a suppression motion (cf. *McCray* v. *Illinois*, 386 U.S. 300); even if it is, it surely must be confined to the extraordinary case in which the delay is designed to prejudice the defendant's ability to obtain

suppression of evidence, and not to cases such as this, in which the delay was concededly not the product of deliberate or even negligent misconduct by the federal prosecutor.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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